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No. 89-802.

Supreme Court, U.S.
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# In the
# Supreme Court of the United States.

OCTOBER TERM, 1989.

GOLDMAN, SACHS & CO.,
GOLDMAN SACHS MONEY MARKETS, INC.,
DAVID B. FORD AND FRANCIS J. GAUL, JR.,
PETITIONERS,

*v.*

KRISTINE M. UTLEY,
RESPONDENT.

## Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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## QUESTION PRESENTED

Whether the Court of Appeals was correct in ruling that Congress intended to preclude even a temporary prospective waiver of a judicial forum under Title VII of the Civil Rights Act of 1964 ("Title VII") and that arbitration is inherently inconsistent with the underlying purposes of Title VII.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-802

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GOLDMAN, SACHS & CO.,
GOLDMAN SACHS MONEY MARKETS, INC.,
DAVID B. FORD and FRANCIS J. GAUL, JR.,

Petitioners

- against -

KRISTINE M. UTLEY,

Respondent

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# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent Kristine M. Utley ("Ms. Utley"), plaintiff below, respectfully opposes the petition for a writ of certiorari to the United States Court of

Appeals for the First Circuit (the "Court of Appeals"), filed by petitioners Goldman, Sachs & Co. ("Goldman Sachs"), Goldman Sachs Money Markets Inc. ("GSMMI"), David B. Ford ("Ford") and Francis J. Gaul, Jr. ("Gaul") (collectively referred to as the "petitioners"), defendants below.

## STATUTORY PROVISIONS INVOLVED

Ms. Utley disagrees that Rule 53 of the Federal Rules of Civil Procedure is a statutory or regulatory provision involved in this case within the meaning of Rule 21.2(f) of the Rules of the Supreme Court of the United States. Ms. Utley otherwise agrees with petitioners' statement of the statutory provisions involved.

## STATEMENT OF THE CASE

Ms. Utley began her employment with Goldman as a sales associate on or about July 8, 1985. On or about February 10, 1986, she was assigned to the Money Market Department ("Department") of the Fixed Income Division ("Division") of the Boston office of GSMMI, where she was the only woman sales associate in the Department. Her employment was abruptly terminated on the eve of Thanksgiving, November 25, 1987.

During her tenure in the Department, Ms. Utley contends that the working environment to which the she was subjected was hostile, intimidating and sexist. Materials which demean and disparage women were circulated through the Division. These materials included announcements with

photographs of women exposing naked breasts substituted for the actual pictures of new female employees.

On or about November 12, 1987, Ms. Utley was asked by petitioner Gaul to consider a transfer to New York, even though any one of the men in Ms. Utley's department was at least equally qualified to fulfill the responsibilities of the job to which she was asked to consider being transferred. Subsequently, Gaul told Ms. Utley that the fact that she handled some of the Hartford-based accounts being transferred to New York was of only "slight" importance in the decision to ask her to transfer her to New York.

Gaul thereafter announced at a staff meeting, without previously asking anyone else to transfer to New York, that Ms.

Utley would likely be moving to New York; Ms. Utley informed the petitioners that she did not wish to be transferred, and requested that they find another solution. Ms. Utley believes she was singled out for transfer on the basis of her sex. Upon information and belief, soon after Ms. Utley was terminated, Goldman hired two male sales associates to be assigned to the Boston office Fixed Income Division. Ms. Utley maintains she could easily have been reassigned to one of the positions being filled by the two male sales associates hired soon after her termination.

After both Ms. Utley and Goldman had engaged counsel with regard to her claims of discrimination, petitioners unlawfully pressured Ms. Utley to speak to the petitioners directly regarding these matters. Despite Ms. Utley's objections to

discussing the proposed transfer without her counsel present, petitioner Ford insisted on speaking with her, and did so on November 25, 1987. During this conversation, Ford abruptly terminated Ms. Utley.

As a condition of her employment with Goldman, Ms. Utley was required to register with the New York Stock Exchange ("NYSE") as a General Securities Representative. In particular, Ms. Utley was required to, and did, execute a "Uniform Application for Securities Industries Registration or Transfer" ("Form U-4") soon after starting her employment with Goldman. The petitioners allege that Ms. Utley was required to, and did, execute a second Form U-4 when she began her employment with GSMMI.

On the last page of the Form U-4, buried in small print, there is a clause which reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10.

Item 10 of the "second" Form U-4 requests registration with the NYSE and other self-regulatory organizations ("SRO").

On November 27, 1987, Ms. Utley filed a complaint with the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission alleging sexual harassment and sex discrimination.

On December 6, 1987, Ms. Utley filed a complaint in Massachusetts Superior Court,

in the County of Suffolk. The Complaint consisted of eight counts, including allegations relating to sexual harassment and discrimination in violation of G.L.M. c. 151B and of G.L.M. c. 12 §11I; and wrongful termination. Petitioners moved to dismiss, or alternatively to stay the proceedings on the ground that Ms. Utley allegedly agreed to arbitrate her claims in accordance with the Constitution, Rules and By-Laws of the New York Stock Exchange. The petitioners' motion was denied by the Massachusetts Superior Court. On May 26, 1989, after remand from the Appeals Court of Massachusetts, the Massachusetts Superior Court entered an order granting petitioners' Motion to Stay with respect to Ms. Utley's common law claims and denying the motion with respect to her state

statutory discrimination and civil rights claims.

On March 22, 1988 Ms. Utley received a Notice of Right to Sue from the EEOC. Thereafter, on April 5, 1988, Ms. Utley filed this federal court action against the petitioners under Title VII of the Civil Rights Act as amended, 42 U.S.C. §2000e-1 et. seq. ("Title VII").

On April 26, 1988, the petitioners filed a Motion for a Stay in which they requested the District Court to stay Ms. Utley's federal court action pending arbitration. The District Court by a Memorandum and Order dated January 17, 1989 denied petitioner's Motion For a Stay. The District Court concluded that the Supreme Court's decision in Alexander v. Gardner-Denver, 415 U.S. 36 (1973), compelled the

decision that Title VII claims are not arbitrable.

On February 3, 1989, the petitioners appealed the District Court's decision to the United States Court of Appeals for the First Circuit. On August 23, 1989, the Court of Appeals affirmed the decision of the District Court. The Court of Appeals held that "Congress intended to preclude even a temporary waiver of a judicial forum." Utley v. Goldman Sachs & Company, et al, 883 F.2d 184, 187 (1989). In addition, the Court of Appeals held that the "District Court acted within its discretion when it declined to stay this action pending resolution of the State Court proceedings." Id. at 187.

The Court of Appeals recognized that in Alexander v. Gardner-Denver Co., 415

U.S. 36, this Court ruled that "arbitration agreements do not preclude an independent right to access to a judicial forum for resolution of Title VII claims." Utley, 883 F.2d at 186. Moreover, the Court of Appeals found that Alexander had not been disturbed by such of this Court's decisions under the Federal Arbitration Act, 9 U.S.C. §1 et seq. ("FAA") following Alexander as Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), and Rodriguez De Quijas v. Shearson/American Express, Inc., 109 S.Ct. 1917 (1989). 883 F.2d at 186. Rather, the Court of Appeals noted that none of these decisions involved discrimination claims. Id. at 186.

Furthermore, the Court of Appeals noted that this Court's decisions involving the FAA recognize that the presumption of arbitrability under the FAA is "defeated when it is 'overridden by a contrary congressional command'. Id. at 186 (quoting Shearson, 482 U.S. at 226. The Court of Appeals concluded that Congress had expressed just such an intent with regard to Title VII. In particular, the Court of Appeals found, in the words of Alexander, that Congress had made the policy against discrimination a "highest priority." Id. at 187. Further, the Court of Appeals found that Title VII 'involved the adjudication of the rights of an individual under the constitution, an inquiry that, with all due respect to arbitration, has historically been the sole

province of Article III adjudication. Id. at 187 (citation omitted).

Finally, the Court of Appeals concluded that Alexander was not limited to situations involving collective bargaining agreements. Id. at 187. In short, the Court of Appeals concluded that neither Alexander nor this Court's decisions under the FAA required an employee to go to arbitration before going to Court. Id. at 187.

## REASONS WHY A WRIT SHOULD NOT BE GRANTED

### I. INTRODUCTION.

Rule 17 of the Rules of the Supreme Court states that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted

only when there are special and important reasons therefor." Sup. Ct. R. 17.1. Rule 17 goes on to enumerate several reasons, not exclusive, for which this Court will grant a writ of certiorari. Only three of these reasons could conceivably apply to the instant case: (1) a conflict between the Federal Courts of Appeals, Sup. Ct. R. 17.1(a); (2) an important and unsettled question of federal law, Sup. Ct. R. 17.1(c); or (3) a conflict with applicable decisions of the Supreme Court, Sup. Ct. R. 17.1(c).

Here, as the petitioners admit, there is no conflict between the federal courts of appeals on the question presented (i.e., whether Congress intended to preclude a waiver of a judicial forum for Title VII claims). In fact, the only other federal

court of appeals to directly confront the question reached the same conclusion as the court of appeals in the instant case. Swenson v. Management Recruiters International, Inc., 858 F.2d 1304, 1307 (8th Cir. 1988) reh'g denied 872 F.2d 264 (1989), cert. denied, 110 S.Ct. 143 (1989).[1]

The petition does not present an unsettled question of federal law. See, S. Ct. R. 17.1(c). While the question of the arbitrability of Title VII claims is an important one, in order to meet the standard set forth in Rule 17.1(c), the

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[1] In addition, it is worth noting that the only United States District Court, other than the United States District Court for the District of Massachusetts in this case, to directly confront this issue also reached the same conclusion as the Court of Appeals in the instant case. See Alford v. Dean Witter Reynolds, Inc., 712 F.Supp. 547, 549 (S.D. Tex. 1989) (Title VII claims are not subject to compulsory arbitration).

question of law presented by a petition should also be one of first impression which has not been, but should be, settled by this Court. See, 13 J. Moore, H. Bendix, and B. Ringle, Moore's Federal Practice, ¶817.41 (1988). The question presented in the instant case, however, has already been settled by this Court in Alexander. In Alexander, this Court held that Congress intended to preclude a waiver of judicial remedies for Title VII claims. 415 U.S. at 51-52. Moreover, while the Court in Alexander did not directly confront the issue of whether an employee can be compelled to arbitrate in the first instance, it is a clear inference from this Court's opinion in Alexander that an employee cannot be so compelled. Id. at 49, 55, 59-60. In addition, despite

petitioners' assertions to the contrary, the Alexander decision was not limited to situations involving collective bargaining agreements. The well-springs of the Alexander decision were not the peculiarities of the collective bargaining setting, but rather the Congressional intent to preclude a prospective waiver of a judicial forum for Title VII claims, and the relative inadequacy of the arbitral forum to decide such matters. Id. at 51-52 and 56.

Finally, as related above, the Court of Appeals' decision does not conflict with this Court's decisions under the FAA subsequent to Alexander, none of which involved discrimination claims. See, e.g., Rodriguez De Quijas, 109 S.Ct. 1917; McMahon, 482 U.S. 220; and Mitsubishi, 473

U.S. 614. Furthermore, this Court's decisions under the FAA have all recognized that the presumption favoring arbitration under the FAA can be overridden as to statutory claims where Congress has evinced an intent to preclude the waiver of a judicial forum or when there is an inherent conflict between the policy underlying the statutory claims and the policy favoring arbitration. See, Mitsubishi, 473 U.S. at 627-628; McMahon, 482 U.S. at 226; and Rodriguez De Quijas, 109 S.Ct. at 1921. As stated above, in Alexander, this Court found just such an intent on the part of Congress and just such a conflict between the policy underlying Title VII and the policy favoring arbitration.

Thus, the petitioners have failed to meet the standard for granting certiorari under Rule 17.

## II. THE COURT SHOULD NOT GRANT A WRIT BECAUSE IT IS SETTLED THAT TITLE VII CLAIMS ARE NOT SUBJECT TO COMPULSORY ARBITRATION AND THE COURT OF APPEALS' DECISION IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

Although petitioners attempt to enlarge the issue in this case to encompass statutory remedies other than Title VII, the question before this Court is whether the Court of Appeals correctly applied this Court's decisions in concluding that Title VII claims are not subject to compulsory arbitration. Ms. Utley submits that the Court of Appeals correctly construed this Court's decision in Alexander as well as its decisions under the FAA in concluding that Title VII claims are not subject to compulsory arbitration.

Petitioners acknowledge that the proper test to be applied in determining whether an arbitration agreement will be held to cover statutory remedies is whether Congress has evinced an intent to preclude the waiver of judicial remedies for the statutory rights at issue or whether there is an inherent conflict between the policy underlying the statutory claims and the policy favoring arbitration. Mitsubishi, 473 U.S. at 627-628; and McMahon, 482 U.S. at 227.

Ample authority exists for the proposition that Congress intended to preclude a waiver of judicial remedies for violations of Title VII. Alexander, 415 U.S. at 51-52; Swenson, 858 F.2d at 1305. See, also, Sape & Hart, Title VII Reconsidered: The Equal Opportunity Act of

1972, 40 Geo. Wash. L. Rev. 824, 879, text and notes 355-357 (1972) (citing to 1971 Hearings 48, 125, 208, 238; H.R.Rep. No. 238, at 11-13; S. Rep. No. 415, at 23-24; and 118 Cong. Rec. S.2301 (daily ed. Feb. 22, 1972)).

This Court has recently reaffirmed the principle that individuals should not be barred from bringing claims under federal statutes designed to protect civil rights. In Lingle v. Norge Div. of Magic Chef, Inc., 108 S.Ct. 1877, 1884 (1988), the Court, quoting from Atchison, T. & S.F.R. Co. v. Buell, 480 U.S. 557, 564-565 (1987) said:

> "This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. See, e.g., McDonald v. West Branch, 466 U.S. 284 [104 S.Ct. 1799, 80 L.Ed.2d 302] (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 [101 S.Ct.

> 1437, 67 L.Ed.2d 641] (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 [94 S.Ct. 1011, 39 L.Ed.2d 147] (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' Barrentine, supra, 450 U.S. at 737 [101 S.Ct. at 1443]." Atchison, T. & S.F.R. Co. v. Buell, 480 U.S. __, __, 107 S.Ct. 1410, 1415, 94 L.Ed.2d 563 (1987) (emphasis added).

Petitioners' position seems to leave no room to find any statutory rights exempt from compulsory arbitration. Clearly, this position is untenable and is in itself in conflict with this Court's decisions.

In fact, Ms. Utley contends that, taken as a whole, this Court's rulings draw a distinction between claims based upon statutes protecting individual rights and

claims based upon business or purely commercial transactions. Thus, in cases involving individual rights, the Court has found a Congressional intent to preclude waiver of judicial remedies. Barrentine v. Arkansas - Best Freight Systems, 450 U.S. 728 (1981) (Fair Labor Standards Act of 1938, 29 U.S.C. §201 et. seq.); McDonald v. City of West Branch, Michigan; 466 U.S. 284 (1984) (claims under 42 U.S.C. §1983); and Alexander v. Gardner-Denver. Compare, Rodriquez De Quijas, 109 S.Ct. 1917 (dispute between investors and brokerage firm under Securities Act of 1933, 15 U.S.C. §77 et. seq.); McMahon, 482 U.S. 220 (dispute between investors and brokerage firm under Securities Act of 1934, 15 U.S.C. §78a et. seq. and Racketeer Influenced and Corrupt Organizations Act

("RICO"), 18 U.S.C. §1961 et. seq.); and Mitsubishi, 473 U.S. 614 (anti-trust dispute under federal anti-trust laws, 15 U.S.C. §1 et. seq.). The Courts of Appeals and District Courts have made a similar distinction. Nicholson v. CPC International, Inc., 877 F.2d 221 (3d Cir. 1989) (Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq. claim); Coppinger v. Metro-North Commuter Railroad, 861 F.2d 33 (2d Cir. 1988) (42 U.S.C. §1983 claim); Swenson v. Management Recruiters International, Inc., 858 F.2d 1304 (8th Cir. 1988) (Title VII claims); and Alford v. Dean Witter Reynolds, Inc., 712 F.Supp. 547 (S.D.Tex. 1989) (Title VII claims). Compare, Arnulfo P. Sulit v. Dean Witter Reynolds, Inc. 847 F.2d 475 (8th Cir. 1988) (Employment Retirement Income

Security Act of 1974, 29 U.S.C. §1001 et seq. claim).[2] In short, "[d]iscrimination and civil rights legislation have traditionally been viewed differently than purely private economic disputes." Swenson, 858 F.2d at 1306. In addition, the Court of Appeals for the First Circuit was correct in finding that under the second prong of the Mitsubishi and McMahon test, there is an inherent conflict between the underlying purposes of Title VII and the policy of the FAA favoring arbitration. The Supreme Court in Alexander discussed at length the reasons why arbitration is an inappropriate forum for resolving Title VII claims. 415 U.S. at 56-58; see, also,

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[2] Ms. Utley notes that this Court was recently presented with the same issue presented in this case in a Petition For a Writ of Certiorari filed by Management Recruiters in the Swenson case. This Court denied certiorari in Swenson. 110 S.Ct. 143 (1989).

McDonald, 466 U.S. at 290-91; Barrentine, 450 U.S. at 743-45. While some of the reasons expressed by the Court in Alexander apply only to grievance arbitration under a collective bargaining agreement, serious concerns evinced by the Court apply as well to the arbitration of employment discrimination disputes before the New York Stock Exchange.

For example, in Alexander the Court noted that "the fact finding process in arbitration usually is not equivalent to judicial fact finding." 415 U.S. at 57. In this case, Ms. Utley's claims would be arbitrated under rules applicable to the securities industry. The New York Stock Exchange Rules reveal that there is limited discovery, the usual rules of evidence do

not apply, no record is kept unless requested by the parties, and written reasons for a decision need not be given. New York Stock Exchange, Inc., Rule 601 et. seq., 2 New York Stock Exchange Guide (CCH) ¶2601 et. seq. The restrictions on discovery, including the fact that there is no provision for depositions, are particularly detrimental to a claimant's ability to prove an employment discrimination claim where the information necessary to prove a case is often in the hands of the employer. See, e.g., Rich v. Martin Marietta, 522 F.2d 333, 343-344 (10th Cir. 1975). Also, the relief available from an arbitral panel convened by the New York Stock Exchange does not include equitable relief, the availability

of which is an essential part of the remedial scheme under Title VII. Cf., Nicholson, 877 F.2d at 228. Nor can a claimant under the New York Stock Exchange arbitration rules recover attorney's fees, which are an essential component of Title VII's enforcement scheme. Furthermore, the availability of a judicial forum is particularly important for statutes like Title VII, which concern public as well as private interests. Title VII suggests that a public forum is an appropriate arena for the judicial scrutiny of issues such as those raised by this case. Judicial construction is necessary because statutory language frequently can be given meaning only by reference to public law concepts. Alexander 415 U.S. at 57. A judicial forum

is also important to insure that the public interest in eliminating discrimination is given proper consideration.[3] In addition to the above, only limited review of the arbitral panel's decision is available, and there is no anti-discrimination policy found in the Rules of the New York Stock Exchange. In sum, there is an inherent conflict between the purposes underlying Title VII and the policy favoring arbitration under the FAA. See, Mitsubishi, 473 U.S. at 627-628; and

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[3] Further, construing a pre-dispute arbitration agreement to mandate arbitration of Title VII claims will have the effect of discouraging claimants from filing charges with the EEOC. Any procedure that inhibits the filing of charges undermines the purpose of Title VII to eliminate unlawful discrimination since the charge not only informs the EEOC of the particular discrimination, but also may identify other unlawful practices. See, EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987).

McMahon, 482 U.S. at 226. Title VII claims are not, therefore, subject to compulsory arbitration.

Petitioners try to draw a distinction between arbitration pursuant to a collective bargaining agreement and arbitration pursuant to an individual agreement. This distinction, however, is not born out either by this Court's decision in Alexander or its decisions under the FAA. First, the motive force behind the Alexander decision was not the peculiarities of grievance arbitration underlying a collective bargaining agreement, but rather what this Court found to be the Congressional intent to preclude a prospective waiver of a judicial forum for Title VII claims, and the comparative

inadequacy of the arbitral forum to decide them. Id. at 51-52, 56. As this Court stated in McDonald v. City of West Branch:

> "[O]ur rejection of a deferral rule in Gardner-Denver was based in large part on our conclusion that Congress intended the [statute] at issue in [Gardner-Denver] to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under [Title VII].

Id. at 285. See, also, Swenson, 858 F.2d at 1306; and Alford, 712 F.Supp. at 549.

Furthermore, contrary to the petitioners' position, this Court's decisions under the FAA actually bolster the conclusion that the distinction the petitioners attempt to draw between collective bargaining agreements and "individually-accepted" arbitration agreements is an invalid one. This Court's FAA decisions all recognize an exception to

the presumption of arbitrability with regard to statutory claims manifesting a Congressional intent to preclude the waiver of a judicial forum. Mitsubishi, 473 U.S. at 627-628; Shearson/American Express, Inc. v. McMahon, 482 U.S. at 226-227; and Rodriguez De Quijas, 109 S.Ct. at 1921. Therefore, unless it is found that the Congressional intent to preclude such a waiver is limited to a situation involving collective bargaining agreements, the rule of non-arbitrability must apply equally to all claimants without regard to the existence of a collective bargaining agreement. The inquiry in each instance must be whether "Congress wanted the substantive protection afforded by a given statute to include protection against waiver of a judicial forum, [an] intention

that will be deducible from text or legislative history." Mitsubishi, 473 U.S. at 628. In Alexander, this Court concluded with respect to Title VII claims, that there was just such a Congressional intent deducible from both the text and legislative history of Title VII. Id. at 51-52. Moreover, there is no indication in Alexander or elsewhere that the Congressional intent expressed in Title VII to preclude a prospective waiver of a judicial forum is limited to employees under a collective bargaining agreement.

Finally, petitioners argue that the Court of Appeals misconstrued Alexander by not finding that under Alexander Ms. Utley should at least be required first to exhaust the arbitration process before she

may pursue her Title VII claims in a judicial forum. Reading Alexander in the manner urged by petitioners, however, misconstrues not only the Alexander opinion but the Mitsubishi test as well. In Alexander, this Court carefully couched its language with respect to an employee going to arbitration before commencing a lawsuit in terms such as "permissive" or "elective". Id. at 49, 55, 59-60. Moreover, under Mitsubishi, this Court opined that if a Court finds a Congressional intent to preclude a waiver of a judicial remedy under Title VII, then the Title VII claim is outside the scope of an agreement to arbitrate and not subject to arbitration. See, McDonald v. City of West Branch, Michigan, 466 U.S. at 290-292

(text and n.11). See also, Gavalik v. Continental Can Co., 812 F.2d 834, 850 and n.30 (3d Cir. 1987). In McDonald, the Court held that:

> although arbitration is well-suited to resolving contractual disputes, our decisions in Barrentine and Gardner-Denver compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that §1983 is designed to safeguard. 466 U.S. at 290.

In McDonald, the Court also cited Alexander v. Gardner-Denver as holding that the rights conferred by Title VII can form "no part of the collective bargaining process" since waiver of these rights would defeat the paramount Congressional purpose behind Title VII. 466 U.S. at 292 (n.12), citing Alexander, 415 U.S. at 51. Thus, while the legislative history and text of Title VII certainly support the principle that the administrative agency charged with

enforcing Title VII should highlight conciliation and informal resolution, it requires a quantum leap to suggest that it mandates exhaustion of arbitration before the NYSE in order for a victim of discrimination to pursue her Title VII claims. Ms. Utley submits that the petitioners' reading of the legislative history of Title VII is incorrect.[4]

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[4] For example, petitioners refer in their petition to the amendment to Title VII permitting courts to appoint a master under Fed. R. Civ. P. 53 if a case has been pending 120 days or more after issue has been joined. 42 U.S.C. 2000e-5(f)(5). Petitioners contend that the amendment supports their argument that Congress intended to provide non-judicial avenues for Title VII claims. However, by framing the issue as whether Congress intended to provide non-judicial forums for Title VII claims, defendants fail to acknowledge important distinctions between reference to a master and arbitration. First, the reference to a master takes place only if the issue has been joined, i.e., discovery has been completed. Secondly, there is a sharp contrast between court supervised masters, many of whom are magistrates, and arbitrators appointed by the New York Stock Exchange (e.g., in terms of expertise with the law and familiarity Title VII issues).

## CONCLUSION

For all of the foregoing reasons, Ms. Utley respectfully requests the Court to deny the petitioners a writ of certiorari in this case.

Respectfully submitted,

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